IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYSTEMS AND COMPUTER TECHNOLOGY CORPORATION	:	CIVIL ACTION
v.	:	
COLUMBIA CASUALTY COMPANY, et al.	:	NO. 06-1663

MEMORANDUM

Dalzell, J. April 25, 2007

Systems and Computer Technology Corporation is suing its former professional liability insurers, Columbia Casualty Company and Illinois Union Insurance Company, for coverage of an Australian lawsuit in which it is a defendant. Before us now are the parties' motions for summary judgment.

I. Factual Background

Systems and Computer Technology Corporation ("SCT") is a global provider of software and software-related services. For three years, from June 30, 1998 to June 30, 2001, it was covered by a professional liability insurance policy from Columbia Casualty Company ("Columbia Casualty"). When that policy expired, SCT bought a one-year professional liability insurance policy from Illinois Union Insurance Company ("Illinois Union"). SCT filed claims with both insurers in connection with an Australian lawsuit in which it is a defendant, and each insurer has denied coverage.

We will briefly describe the Australian litigation and then set forth in some detail the two policies and the notices of claim at issue.

A. The Integral Litigation in Australia

In April of 1997, SCT Utility Systems, Inc. ("SCT Utility"), a subsidiary of SCT,[1] entered into a Software Marketing and Sublicensing Agreement with Managed Information Technology Solutions Limited ("MITS"), a company in Melbourne, Australia. MITS sublicensed and distributed SCT's software, including the BANNER software program, in Australia and other parts of the Pacific Rim. One of the companies to which MITS sublicensed SCT's BANNER software was an Australian utility company, Integral Energy ("Integral"), and BANNER became part of Integral's Customer Service System ("CSS"). MITS, SCT, and another company, Electronic Data Systems ("EDS"), performed services for Integral in connection with the CSS project.

In April of 2001, Integral sued MITS and EDS under the Australian Trade Practices Act for alleged misrepresentations or wrongful acts concerning the CSS project. On February 21, 2003, Integral amended its Statement of Claim (i.e., complaint) and added SCT as a defendant. See Pl.'s Mot. for Summ. J. ("Pl.'s Mot."), Ex. B Integral Am. Statement of Claim ("Integral Am. Statement"). Integral charged SCT with breach of contract and negligence for breaching the duty of care it owed to Integral.

[1] SCT Utility was a wholly-owned and direct subsidiary of SCT until March 5, 2003, when it was sold to Indus International. See Pl.'s Mot. for Summ. J., Ex. D Pl.'s Resps. & Objections to Columbia Casualty's Interrog. No. 15. SCT retained liability for the Integral claim. See id. SCT contends, and Columbia Casualty does not dispute, that SCT Utility is covered under Columbia Casualty's policy, pursuant to the Subsidiary Coverage Endorsement. See Columbia Casualty Policy, Endorsement No. 4. Thus, any reference herein to SCT encompasses SCT Utility.

Id. at ¶¶ 48, 53-54. The bases for these claims include SCT's alleged failure "to include approved Australianisation modifications into its core BANNER product within 3 years of execution of the contract between Integral and MITS for the CSS project." Id. at ¶ 48(g); see also id. at ¶ 54(g). Integral also stated a claim against SCT under Section 52 of the Australian Trade Practices Act, based on SCT's alleged misrepresentations. Id. at ¶ 59.

As detailed below, SCT sought coverage for the Integral action from its professional liability insurers.

B. The Columbia Casualty Company Policy

Columbia Casualty issued to SCT and its subsidiaries[2] a Miscellaneous Professional Liability insurance policy, effective from June 30, 1998 to June 30, 2001. See Pl.'s Mot., Ex. A Columbia Casualty Policy, Declarations Items 2, 6 (as modified by Endorsement No. 4). This is a "claims made and reported" insurance policy, which provides that:

> [Columbia Casualty] will pay on behalf of [SCT] all sums which [SCT] shall become legally obligated to pay as **Damages** and **Claim Expenses** resulting from any **Claim** first made against [SCT] and reported to [Columbia Casualty] in writing during the **Policy Period** for any **Wrongful Act** of [SCT], or someone for whose **Wrongful Acts** [SCT] is legally responsible, provided, however, that such **Wrongful Act** was committed on or subsequent to the **Retroactive Date** specified in Item 6. of the Declarations.

[2] The Subsidiary Coverage Endorsement provides that the policy covers SCT and any subsidiary thereof. See Columbia Casualty Policy, Endorsement No. 4.

Id. at I.1.

A "claim" includes "any demand received by [SCT] for **Damages** alleging a **Wrongful Act** including a civil action or suit or institution of arbitration proceedings." Id. at II.2. The policy "applies to **Wrongful Acts** committed by [SCT] anywhere in the world." Id. at Endorsement No. 3. A "wrongful act" is "any actual or alleged breach of duty, neglect, error, negligent misstatement, misleading statement or omission or **Personal Injury** unintentionally committed solely in the conduct of [SCT's] **Professional Services**." Id. at I.12. (as modified by Endorsement No. 2). "Professional services" are those "[s]olely in the performance of providing **Computer Services** for others for a fee" and must be "performed by or on behalf of [SCT]." Id. at Declarations Item 7, and II.9. The policy defines "computer services" as "systems analysis, designing, programming, data processing, consulting, outsourcing, system integration, information services, marketing, selling, servicing, distributing, installing, and maintaining computer hardware and/or software and training in the use of such hardware and/or software and all other related services." Id. at Endorsement No. 1.

The policy also specifies how SCT had to notify Columbia Casualty of any "claims" or "potential claims:"

> a. NOTICE OF **CLAIMS**
>
> [SCT] shall, as a condition precedent to their right to the protection afforded by this Policy, give to [Columbia Casualty] prompt written notice of (1) any **Claim** made against [SCT]; or (2) the receipt of notice

> (written or verbal) or any threat of an intention to hold [SCT] responsible for any **Wrongful Act**.
>
> b. NOTICE OF POTENTIAL **CLAIMS**
>
> If, during the **Policy Period**, [SCT] first becomes aware of a **Wrongful Act** to which this insurance applies and which might subsequently give rise to a **Claim**, and provides [Columbia Casualty], during the **Policy Period**, with written notice containing the names of injured parties and specifics of the time, place, and nature of the **Wrongful Act**, then any **Claim** subsequently made for the **Wrongful Act** shall be treated as having been made when [Columbia Casualty] first received such written notice.

Id. at IV.4.a-b.

Finally, the policy gives Columbia Casualty "the right to defend any **Claim** brought against [SCT] alleging a **Wrongful Act** even if such **Claim** is groundless, false or fraudulent" and prohibits SCT from "admit[ting] or assum[ing] liability or settl[ing] and [sic] **Claim** or incur[ring] any cost, charge or expense without the written consent of [Columbia Casualty]." Id. at I.2. (as modified by Endorsement No. 3); see also id. at II.3. ("claims expenses" definition includes requirement of Columbia Casualty's "written consent").

C. The Illinois Union Insurance Company Policy

Illinois Union issued to SCT a claims made Miscellaneous Errors and Omissions Liability Policy, effective June 30, 2002 through June 30, 2003. See Illinois Union's Mot. for Summ. J. ("Illinois Union's Mot."), Ex. 4 Illinois Union Policy. This policy provides that:

> Illinois Union will pay on behalf of [SCT] all sums in excess of the Deductible that [SCT] shall become legally obligated to pay as **Damages** and **Claims Expenses** because of a **Claim** first made against [SCT] during the **Policy Period** by reason of a **Wrongful Act** in the performance of or failure to perform **Professional Services** by [SCT] or by any other person or entity for whom [SCT] is legally liable.

Id. at I.A.

The policy defines "claim" as "a written demand seeking **Damages**, **Professional Services**, money, action, equitable relief, (which means a remedy not involving the payment of money damages) including any civil proceeding against [SCT] for a **Wrongful Act**, in the performance of or failure to perform **Professional Services**." Id. at Endorsement No. 3. "Related claims" are "all **Claims** arising out of a single **Wrongful Act** or a series of **Related Wrongful Acts** in the performance of or failure to perform **Professional Services**." Id. at II.N. The policy also describes how it treats "multiple claims": "All **Related Claims** shall be deemed a single **Claim**, and such **Claim** shall be deemed to be first made on the date the earliest such **Related Claims** is [sic] first made against [SCT], regardless of whether such date is before or during the **Policy Period**." Id. at III.3.

A "wrongful act" is "any actual or alleged act, error, omission, misstatement, misleading statement, **Personal Injury**, neglect or breach of duty by [SCT] in their capacity of such or by any other person or entity for whom [SCT] is legally liable." Id. at II.Q. Also, "related wrongful acts" are "all **Wrongful Acts** that are temporally, logically, or causally connected by any

common fact, circumstance, situation, transaction, event, advice or decision." Id. at II.O.

The Illinois Union policy includes the following exclusions:

> This policy does not apply to any **Claim** against the **Insured**:
> . . .
> D. based on or arising out of any actual or alleged breach of any contract, warranty, guarantee or promise unless such liability would have attached to the **Insured** even in the absence of such contract, warranty, guarantee or promise;
> . . .
> K. based on or arising out of a **Wrongful Act** actually or allegedly committed prior to the beginning of the **Policy Period**, if, on or before the earlier of the effective date of this Policy or the effective date of any Policy issued by [Illinois Union] to which this Policy is a continuous renewal or replacement, [SCT] knew or reasonably could have foreseen that the **Wrongful Act** did or could lead to a **Claim**;
>
> L. based on or arising out of a **Wrongful Act**, fact or circumstance which before the effective date of the Policy was reported to [Illinois Union] or any other Insurer;

Id. at IV.

The Endorsements to the policy also specify certain exclusions. Endorsement 6, the "Pending & Prior Litigation Exclusion," provides "that this Policy excludes all **Claims** arising from all pending and prior litigation, as well as any future **Claims** arising out of said pending or prior litigation prior to June 30, 2001." Id. at Endorsement 6. Endorsement 7, "The Self Insured Retention Endorsement," provides, in part: "[SCT] shall have the right to appoint counsel, after notification to [Illinois Union] of the name of counsel and counsel's hourly rates and subject to [Illinois Union's]

reasonable consent and approval, to defend any covered **Claim** brought against [SCT] even if the **Claim** is groundless, false or fraudulent. . . ." Id. at Endorsement 7.B.

D. SCT's Notices to the Insurers

On April 24, 2001, SCT sent a letter to Columbia Casualty's counsel concerning the Integral project. See Pl.'s Mot., Ex. G. Captioned "Re: *MITS/Logica v. SCT Utility Systems, Inc.*,"[3] the letter stated:

> SCT [Utility] and MITS are parties to a Software Marketing and Sublicensing Agreement dated April 21, 1997, as subsequently amended ("Distribution Agreement"). Under the Distribution Agreement, SCT [Utility] gave MITS the right to sublicense the company's utility billing software ("SCT CIS") to certain utilities in Australia and elsewhere in the Pacific Rim. MITS in turn granted Integral a sublicense to use SCT CIS, and Integral engaged EDS to provide Integral with certain systems integration services in connection with Integral's use of SCT CIS. As you will note from the correspondence, it appears that Integral is filing a claim against MITS in order to preserve its rights under the applicable Australian statute of limitations.
>
> While to the best of SCT's knowledge, MITS has not initiated any legal action against SCT in this matter, MITS has nonetheless put SCT on notice of the claim that Integral has asserted against MITS. SCT in term [sic] wanted to notify SCT's carrier(s) of this matter. Accordingly, please accept this letter and the enclosed letter as notice of a claim under SCT's applicable insurance policies. Please notify me if you require any additional information of SCT in order to properly notify SCT's insurance carrier or carriers of this claim. I will keep you informed of any developments

[3] MITS is a unit of Logica Australasia.

> and welcome any suggestions you may have. Feel free to call me if you have any questions or require further information relating to this matter.

SCT Letter of Apr. 24, 2001.

The letter also enclosed copies of an April 2, 2001 letter from Integral to MITS, and an April 6, 2001 e-mail message from MITS to SCT. See Pl.'s Mot., Ex. G. Integral's letter advised MITS that it was "currently conducting a review of the implementation of the CSS system. That review is still under way, and includes a legal review." Integral Letter of Apr. 2, 2001. Integral also affirmed its commitment to negotiations and stated that it was filing the claim to preserve its legal rights. MITS's e-mail message to SCT further explained that the action concerned the implementation of Integral's CSS. MITS also reported that Integral had told it the action was primarily against EDS, and Integral wanted to settle the matter through negotiation but had lodged the claim as a precaution.

In a May 1, 2001 letter, Columbia Casualty's counsel informed SCT that Columbia had "no obligation under the policy in connection with that matter" because neither MITS nor Integral had alleged a wrongful act by SCT. Columbia Casualty's Mot. for Summ. J. ("Columbia Casualty's Mot."), Ex. 8. Columbia Casualty stated this conclusion after reviewing its policy's definitions for "claim," "wrongful act," and "damages," as well as Integral's letter to MITS. Id. The insurer also advised SCT that it would consider any further information SCT provided, and it asked SCT to keep it apprised of the situation. Id. SCT did not respond

in writing to Columbia Casualty's May 1, 2001 letter. See id. at Ex. 1 Pl.'s Resps. & Objections to Columbia Casualty's Req. for Admissions ("SCT's Resps. to Req.") No. 4; see also Bennett Dep. 146:5-11, Jan. 3, 2007 (SCT's in-house counsel did not recall responding to May 1, 2001 letter).

On June 29, 2001, SCT sent Columbia Casualty's counsel a letter with an attached chart entitled "Client Litigation Risk," wherein SCT described "matters relating to [SCT's] utility division" that SCT was "reporting as claims." Pl.'s Mot., Ex. L. The first entry identifies the "Client" as "Integral Energy" and provides the following description:

> Australian client, through a Channel Partner, MITS, has repeatedly expressed dissatisfaction with quality of product and SCT[']s alleged failure to incorporate Australian and deregulation features into its product. Integral has filed action in Australian Courts against MITS to preserve litigation option while pursuing negotiated business resolution of issues. SCT [sic]

Id.

In an August 1, 2001 letter, Columbia Casualty's counsel again stated that the Integral description did not satisfy the policy's requirements for notice of claims or potential claims. See Pl.'s Mot., Ex. N. The letter explained that:

> To the extent that the "failure to incorporate Australian deregulation features into its product" can be considered an alleged "Wrongful Act," at present there does not appear to be a demand for Damages against SCT or a Claim as defined in the Policy, and therefore the information does not constitute Notice of a Claim. Moreover, your description of the matter does not contain

> the specifics required under the Policy for Notice of a Potential Claim. In that regard, we note that the last sentence in the description of this matter appears to be incomplete.

Id. SCT did not provide a written response to Columbia Casualty's letter. See SCT's Resps. to Req. No. 8.

On February 21, 2003, Integral amended its complaint in the Australian litigation and added SCT as a defendant. Shortly thereafter, on March 13 and March 31, 2003, SCT sent virtually identical letters to Illinois Union and Columbia Casualty, respectively, that enclosed the amended complaint, advised that SCT had retained a Sydney firm to represent it, and requested that each insurer "accept this letter and the enclosed complaint as notice of a claim under SCT's applicable insurance policies." Pl.'s Mot., Ex. O SCT Letter to Columbia Casualty, Mar. 31, 2003; Illinois Union's Mot., Ex. 24 SCT Letter to Illinois Union, Mar. 13, 2003. Only the opening paragraphs of the two letters differ materially. SCT's letter to Illinois Union did not mention the earlier correspondence with Columbia Casualty about the Integral case. However, SCT's letter to Columbia Casualty stated, "I refer you to my letter to you dated April 24, 2001 regarding the above-captioned matter. SCT Utility Systems, Inc. ('USI') has now been sued in this matter . . . ." SCT Letter, Mar. 31, 2003; see also Bennett Dep. 150:4-19.

In a June 11, 2003 letter to SCT, Columbia Casualty again denied coverage pointing out that the policy had expired on June 30, 2001 and reiterating its position with respect to SCT's April 24, 2001 letter. See Columbia Casualty's Mot., Ex. 16.

SCT did not respond in writing to Columbia Casualty's letter. See SCT's Resps. to Req. No. 11. SCT did not contact Columbia Casualty again regarding the BANNER software until December 7, 2005. Id. at 12. In response to several phone conversations with SCT's counsel, Columbia Casualty's counsel sent a March 30, 2006 letter repeating its position that it did not owe coverage to SCT. See Columbia Casualty's Mot., Ex. 27.

As for Illinois Union, it acknowledged receipt of SCT's May 13, 2003 letter that same day and advised that it was reviewing the information provided and establishing a claims file. See Pl.'s Opp'n to Illinois Union's Mot. ("Pl.'s Opp'n"), Ex. 13 Illinois Union Letter to SCT, May 13, 2003.[4] For more than two years, Illinois Union, typically through its claims administrator, conferred with SCT on coverage issues, liability, damages, and the progress of the Australian litigation. See Illinois Union's Mot., Exs. 27-40 (Correspondence between SCT and Illinois Union from May of 2003 through June of 2005[5]).

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[4] We note that ACE USA, Illinois Union's claims administrator, prepared and sent this letter and others to SCT. Since ACE USA was acting on Illinois Union's behalf, we attribute ACE USA's correspondence to Illinois Union.

[5] Around June of 2005, SCT's corporate counsel verbally requested three million dollars in settlement authority from Illinois Union. See Serota Dep. 37:3-40:13, Jan. 8, 2007. In a June 25, 2005 letter, Illinois Union offered SCT $500,000 in settlement authority, subject to a reservation of rights and defenses, and it requested further information about the Integral action to analyze the matter. See Illinois Union's Mot., Ex. 40. Illinois Union later increased the sum to $833,333.33. See Pl.'s Opp'n, Ex. 21 Corey's Notes (undated); see also Serota Dep. 47:19-48:17. SCT and its two co-defendants in the Integral action never reached an agreement as to a settlement offer, so SCT never extended any settlement offer to Integral. See Serota (continued...)

By June of 2005, SCT's in-house counsel, Randi Serota, reported to Illinois Union that SCT had satisfied its policy retention ($750,000). See Pl.'s Opp'n, Ex. 18 SCT Letter to Illinois Union, June 3, 2005. SCT requested by letter that Illinois Union fund the Integral litigation and confirmed that SCT would continue to provide legal invoices from that case. Id. Ms. Serota testified that Vince Corey, the claims director for Illinois Union's claims administrator, told her in a June of 2005 phone conversation "that the request to fund the ongoing litigation should not be a problem." Serota Dep. 30:21-24. Vince Corey's notes confirm that SCT had "tendered 800K in bills - which still going through," meaning that Corey was reviewing the "800,000 Australian in bills." Pl.'s Opp'n, Ex. 19 Corey's Notes (undated); Corey Dep. 158:11-19, Jan. 9, 2007 (explaining his notes). Corey's notes also recorded that SCT had asked Illinois Union "to fund defense going forward," and he wrote next to that "agree to fund going forward."

Illinois Union for the first -- but not the only -- time stated a reservation of rights in a February 9, 2004 letter to SCT. Therein, the insurer identified some relevant coverage issues (including certain exclusions), requested further information from SCT, explained that it was continuing to investigate whether coverage existed, and advised that SCT should not deem any of Illinois Union's actions to be a waiver of any of

[5](...continued)
Dep. 49:24-51:11.

its rights to deny coverage under the policy. See Illinois Union's Mot., Ex. 36.

When SCT had applied for Illinois Union's coverage in June of 2001, it completed an application form. That form, signed by SCT's Chief Financial Officer and dated June 25, 2001, asked SCT to disclose whether it had "knowledge or information of any act or omission which might reasonably be expected to give rise to a claim." Id. at Ex. 12 Insurance Application, Question 12.a. SCT's response did not identify the Integral matter. See id. SCT also warranted that its representations were true and that it would notify Illinois Union if any information in the application changed materially from June 25, 2001 until the inception date of the policy, June 30, 2001. See id. at 4. With this application, SCT provided a claims listing (i.e., "loss run") dated March 1, 2001 -- before Integral filed its lawsuit -- that did not mention Integral or MITS. See id. at Attachment D. At the top of that document, SCT stated "THIS CLAIMS LISTING IS NOT COMPLETELY UPDATED SINCE MAY MEETING. UPDATE WILL BE PROVIDED BY WEDNESDAY AFTERNOON." Id. There is no evidence that SCT provided the promised update.

However, SCT had at some point provided to Illinois Union a loss run and a loss history, both dated May 14, 2002, which mentioned MITS and Integral. See Pl.'s Opp'n, Ex. 8. In an October 27, 2005 letter to SCT, Illinois Union mentioned those documents, wherein SCT had identified MITS and Integral as claimants in an April of 2001 claim and described the "Status" of

the matter as "No claim brought." See Illinois Union's Mot., Ex. 42. Illinois Union asked the following of SCT:

> Please provide an explanation to us about the references to MITS and Integral on the . . . loss history and loss run documents, whether they are the same matters or disputes as the suit subsequently filed, and whether and how your prior carrier, [Columbia Casualty], was notified of this matter or suit and, if so, its coverage position or response. Please transmit to us any communication with your broker, CNA, or anyone else regarding the items in those documents. To the extent that this suit represents or reflects the same matter or dispute described, referred to, or listed in these documents, we must reserve the insurer's right to deny coverage pursuant to Exclusions K or L.

Id. at 7-8. The letter also stated: "We must reserve the insurer's right to deny coverage for this matter based upon the [Pending & Prior Litigation Exclusion], insofar as the claim against the insured arose from the Integral suit commenced and pending before June 30, 2001." Id. at 8.

Three-and-a-half weeks later, SCT for the first time provided Illinois Union with copies of SCT's April 24, 2001 correspondence with Columbia Casualty. See Illinois Union's Mot., Ex. 44 SCT Letter to Illinois Union, Nov. 21, 2005. In a December 2, 2005 letter, Illinois Union requested copies of more documents, including SCT's June 29, 2001 letter and attachment to Columbia Casualty. See id. at Ex. 45. On January 12 and February 9, 2006, Illinois Union again sent written requests for the previously identified information and repeated its reservation of rights. See id. at Exs. 47, 49. The January letter also stated that Illinois Union was not obligated to pay

defense costs until factual matters concerning the policy exclusions were resolved. On February 9, 2006, SCT sent a facsimile transmission providing Illinois Union, for the first time, with a copy of SCT's June, 2001 correspondence with Columbia Casualty. See id. at Ex. 50. SCT also explained its position that it believed Illinois Union had to pay the Integral defense costs. See id. at Ex. 50.

Less than a week later, Illinois Union sent a letter disclaiming coverage. See id. at Ex. 51 Illinois Union Letter to SCT, Feb. 15, 2006. According to Illinois Union's letter, SCT's claim was not covered because it entailed, related to, or arose from claims before the inception of the policy. Moreover, the insurer found that the claim was barred under Exclusions D, K, and L, and Endorsements 6 and 7.

E. This Litigation

On April 20, 2006, SCT filed a four-count complaint against Columbia Casualty and Illinois Union. Count I charges Columbia Casualty with breach of contract, and Count III seeks a declaratory judgment that Columbia Casualty's policy provides coverage for SCT's defense costs and any damages or claims expenses for which SCT becomes legally liable in the Integral action. Counts II and IV, made in the alternative, advance the same claims against Illinois Union. SCT and Columbia Casualty have submitted cross-motions for summary judgment, and Illinois Union has moved for summary judgment against SCT.

II. Analysis

A. Legal Standard[6]

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). The task for the Court is to inquire "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Lobby, 477 U.S. at 251-52; Tabas v. Tabas, 47 F.3d 1280, 1287 (3d Cir. 1995) (en banc).

Under Pennsylvania law, the interpretation of an insurance contract is a question of law for the court to decide. Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997). Thus, on a summary judgment motion a court can determine, as a matter of law, whether a claim is within a policy's coverage or

[6] In this diversity action, the parties agree that Pennsylvania law applies, and we, too, find that Pennsylvania law governs here.

is barred by an exclusion. Butterfield v. Giuntoli, 670 A.2d 646, 651 (Pa. Super. Ct. 1995). Courts interpret coverage clauses broadly "to afford the greatest possible protection to the insured," and, accordingly, they interpret exceptions to an insurer's general liability narrowly against the insurer. Westport Ins. Corp. v. Bayer, 284 F.3d 489, 498 n.7 (3d Cir. 2002) (quoting Eichelberger v. Warner, 434 A.2d 747, 750 (Pa. Super. Ct. 1981)). In Pennsylvania, the insured bears the burden of proving facts that bring its claim within the policy's coverage. Koppers Co., Inc. v. Aetna Cas. and Sur. Co., 98 F.3d 1440, 1446 (3d Cir. 1996). The insurer, however, bears the burden of proving that any exclusions or limitations on coverage apply, because disclaiming coverage on the basis of an exclusion is an affirmative defense. Id.

Where a policy provision is ambiguous, courts construe the policy provision in favor of the insured and against the insurer, the drafter of the agreement. Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983). But where the policy's language is clear and unambiguous, courts give effect to that language. Id. Ambiguity exists if contractual language "is reasonably susceptible of different constructions and capable of being understood in more than one sense." Madison Const. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999) (internal citation and quotation omitted). Courts do not resolve the question of ambiguity in a vacuum, but instead consider whether the policy language is

subject to more than one reasonable interpretation when applied to a given set of facts. Id.

We now consider if either insurer must reimburse SCT's legal costs and indemnify it against any losses arising from the Integral action.

B. Columbia Casualty

We must decide whether SCT's correspondence from April and June of 2001 constitutes adequate notice of a potential claim under Columbia Casualty's policy. SCT has the burden of showing its claim is covered by the policy, and Columbia Casualty has the burden of proving that any policy exclusions would apply to an otherwise covered claim. We construe any ambiguities concerning policy language in favor of the insured, SCT.

1. Notice requirements for a potential claim

Columbia Casualty and SCT dispute whether SCT's letters of April 24 and June 29, 2001, along with their enclosures and attachments, gave notice of a "potential claim."[7] The policy's "NOTICE OF POTENTIAL CLAIMS" provision requires the insured to give Columbia Casualty "written notice containing the names of injured parties and specifics of the time, place, and nature of

[7] Columbia Casualty and SCT agree that our inquiry focuses on whether SCT's 2001 notices alone -- and not information later uncovered -- satisfy the policy's requirements for notice of a potential claim. See Columbia Casualty's Mem. in Supp. of Mot. for Summ. J. ("Columbia Casualty's Mem.") 15-16; Pl.'s Resp. to Columbia Casualty's Mot. 9. Nevertheless, both sides point to SCT's attorneys' conflicting opinions -- expressed after Columbia Casualty's policy expired -- about the effect of SCT's notices. Because those opinions are irrelevant to our inquiry, we do not consider them.

the **Wrongful Act**." Columbia Casualty Policy IV.4.b (underscore added). We compare these requirements with the information SCT provided, addressing first whether SCT's letters and attachments identified a "wrongful act."

As set forth earlier, SCT requested that Columbia Casualty accept its April 24, 2001 letter and enclosures as a notice of claim. SCT explained in that letter that SCT Utility and MITS were parties to a Software Marketing and Sublicensing Agreement and that Integral was suing MITS under the Australian Trade Practices Act in connection with the implementation of Integral's Customer Service System. Because MITS notified SCT of Integral's claim against MITS, SCT "wanted to notify SCT's carrier(s) of this matter." SCT Letter of Apr. 24, 2001. Moreover, in the enclosed April 2, 2001 letter from Integral to MITS, Integral explained it was conducting an on-going review of the matter, including a "legal review." Columbia Casualty therefore knew that Integral was continuing to explore its legal options.

Columbia Casualty rejected this notice on May 1, 2001, advising that SCT had not identified a "wrongful act" -- a position it maintains today. While SCT's correspondence shows it anticipated that Integral's allegations against SCT's partner MITS might lead to a claim against SCT, we agree with Columbia Casualty that this correspondence -- standing alone -- fails to properly notify Columbia Casualty of a "wrongful act." It does not identify an alleged act, error, or omission by SCT, or any professional services SCT provided to a potential claimant for a

fee. We next consider whether the further information SCT provided in June gave notice of a "wrongful act."

In June of 2001, SCT again reported the Integral matter to Columbia Casualty as a claim. SCT's "Client Litigation Risk" chart stated that SCT's "Australian client" Integral had sued SCT's "Channel Partner" MITS. The chart explained that Integral "has repeatedly expressed dissatisfaction with quality of product and SCT[']s alleged failure to incorporate Australian and deregulation features into its product." Client Litigation Risk Chart, at 1.

The parties dispute whether this information gave sufficient notice of a "wrongful act." SCT contends that it disclosed that it had committed an alleged error, breach of duty or negligence in performing its professional services, namely computer services, to Integral for a fee.[8] Columbia Casualty asserts that Integral's mere "dissatisfaction" does not constitute a "wrongful act". Moreover, it contends that SCT's letter does not suggest Integral had alleged "that SCT committed

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[8] As already noted, a "wrongful act" is "any actual or alleged breach of duty, neglect, error, negligent misstatement, misleading statement or omission or **Personal Injury** unintentionally committed solely in the conduct of [SCT's] **Professional Services**." Columbia Casualty Policy I.12. (as modified by Endorsement No. 2). "Professional services" are those "[s]olely in the performance of providing **Computer Services** for others for a fee" and must be "performed by or on behalf of [SCT]." Id. at Declarations Item 7, II.9. "Computer services" is defined, in full, as any of the following: "systems analysis, designing, programming, data processing, consulting, outsourcing, system integration, information services, marketing, selling, servicing, distributing, installing, and maintaining computer hardware and/or software and training in the use of such hardware and/or software and all other related services." Id. at Endorsement No. 1.

any error in connection with work Integral retained SCT to perform." Columbia Casualty's Mem. 14.

According to SCT, its chart notified Columbia Casualty that a client -- in other words, a company for whom SCT provided services for a fee[9] -- alleged an error, breach of duty, or neglect by SCT, the types of actions that constitute a "wrongful act." Moreover, SCT contends that its "alleged failure to incorporate Australian and deregulation features into its product" describes the kinds of services identified in the policy's broad definition of computer services, which includes such actions as designing, marketing, and distributing software. SCT therefore contends it sufficiently described its professional services -- those computer services it provided to Integral for a fee.

We find that the June correspondence sufficiently notified Columbia Casualty of a "wrongful act" and the nature of that act. First, SCT's "alleged failure" to incorporate certain features into its software is fairly read as an "alleged breach of duty, neglect, error, negligent misstatement, misleading

[9] SCT points out that Integral itself alleges it paid SCT. See Pl.'s Mem. in Supp. of Mot. for Summ. J. ("Pl.'s Mem.") 24. Indeed, Integral seeks damages for "BANNER software additional supplier costs, including amounts paid by Integral to MITS and SCT in January 2000 and following to rectify the BANNER software and the CSS system including, but not limited to, the engagement of MITS and SCT to undertake the Maestro Scheduling Implementation." Integral Am. Statement ¶ 60.E. Our focus, however, is whether the information SCT gave Columbia Casualty in 2001 notified the insurer that SCT provided Integral services for a fee. Because Integral's 2003 Amended Statement of Claim was not part of the 2001 correspondence, we shall not consider those allegations concerning Integral's payments to SCT.

statement or omission," thereby satisfying the definition of "wrongful act". Second, the policy's broad definition of computer services encompasses the services that SCT allegedly failed to properly perform for Integral, namely, the incorporation of Australian and deregulation features into SCT's product. Finally, SCT sufficiently notified Columbia Casualty that it was performing computer services "for others for a fee" by identifying Integral as a client. Columbia Casualty does not contend that SCT falsely reported Integral was a client. Indeed, the insurer knew the nature of SCT's business, and no party has suggested that SCT had a habit of doling out its services gratis to clients. Nor does the policy require that an insured's notice of potential claim provide any details about any fee, such as its amount or date of payment, so we must resolve any ambiguity concerning the fee reporting requirement in favor of SCT. On these facts, any commonsense reading of "client" communicated to Columbia Casualty that SCT was receiving a "fee" for the services it provided to Integral.[10,11] In sum, SCT provided sufficient notice of the nature of its "wrongful act."

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[10] Indeed, Columbia Casualty's brief uses "client" to describe the "others" for whom the insured must perform computer services "for a fee." See Columbia Casualty's Mem. 1 (explaining that in 2001 "there were no allegations that SCT itself had committed any errors or omissions in work it performed for a client"); id. at 13 (explaining that "notice of 'facts and circumstances' can only secure coverage at the time of notice if it identifies an error by the insured in services it performed for a client").

[11] While we find that SCT sufficiently complied with the requirements for notice of a potential claim as they concern a fee, Columbia Casualty is entitled to verify, through whatever means its policy provides, that SCT in fact received that fee.

Second, SCT had to identify the alleged injured party's name. SCT's written notice to Columbia Casualty described Integral as an Australian client that had sued SCT's Channel Partner MITS and was complaining about SCT's services. Thus, SCT plainly identified Integral -- the entity that later sued it -- as an "injured party."

Third, we consider if SCT's written communications notified Columbia Casualty of the location of SCT's alleged "wrongful act." SCT's April, 2001 letter explained that MITS could sublicense SCT Utility's billing software to certain utilities in Australia and the Pacific Rim. SCT's June 2001 chart also identified Integral as an "Australian client." Columbia Casualty's policy does not specify the level of detail required for identifying a location (e.g., city, county, state/province, or country), so we must resolve this ambiguity in favor of SCT by interpreting the term broadly. Moreover, Columbia Casualty had actual knowledge of the location in question. Columbia Casualty's representative, Stephanie Solomon, the Assistant Vice-President of Commercial Accounts Claims, testified in her deposition that, based on the April 24, 2001 letter and its enclosures, Columbia Casualty understood the location of the injury to be Melbourne, Australia. See Pl.'s Mot., Ex. P Solomon Dep. 9:12-14, 35:20-36:5, 10-21, Jan. 4, 2007. In sum, SCT sufficiently notified Columbia Casualty of the location of the "wrongful act" within Australia.

Finally, SCT was required to notify Columbia Casualty of the time the wrongful acts occurred, and Columbia Casualty

does not challenge the sufficiency of notice on this point. SCT's April 24, 2001 letter reported that SCT Utility and MITS were parties to an April 21, 1997 sublicensing agreement, and Integral's letter to MITS makes clear that the acts occurred before April 2, 2001. Accordingly, the acts occurred between April 21, 1997 and April 2, 2001. Because the policy does not explain how specifically SCT was obliged to describe the time, we interpret the term broadly to protect the insured. We find that SCT gave the insurer sufficient notice of the time of the "wrongful act."

After comparing Columbia Casualty's policy requirements concerning notice of a potential claim with all of the information SCT provided in its notices, we find that SCT sufficiently notified Columbia Casualty of a potential claim within the policy period.

2. SCT's defense costs in the Australian case

In a footnote, Columbia Casualty contends that even if we find SCT's notice was adequate, it has no obligation to reimburse SCT for the defense costs incurred without obtaining Columbia Casualty's written consent. See Columbia Casualty's Mem. 14-15 n.1. The policy's Worldwide Coverage Endorsement gives the insurer "the right to defend any **Claim** brought against [SCT] alleging a **Wrongful Act** even if such **Claim** is groundless, false or fraudulent" and further provides that "[SCT] shall not admit or assume liability or settle and [sic] **Claim** or incur any cost, charge or expense without the written consent of [Columbia Casualty]." Columbia Casualty Policy at I.2. (as modified by Endorsement No. 3). Columbia asserts that because it never gave written consent to the defense costs SCT incurred in the Australian litigation -- which allegedly reached $1.9 million by April of 2006, see Compl. ¶ 62, and are now said to be $4,208,461 -- it is not liable for those costs.

Columbia Casualty further contends that it was severely prejudiced by Illinois Union's denial of coverage almost three years after Illinois Union received notice of the claim. Until February of 2006, SCT was discussing coverage with Illinois Union and providing that insurer with the Australian attorneys' invoices. Illinois Union had also verbally advised SCT in June of 2005 "that the request to fund the ongoing litigation should not be a problem." Serota Dep. 30:21-24. Thus, Columbia Casualty asserts that it was unable to exercise its right to

participate in the defense or explore potentially promising early settlement opportunities.

Columbia Casualty cites a single case to support its argument, Clemente v. Home Insurance Co., 791 F. Supp. 118 (E.D. Pa. 1992). The plaintiff there sought reimbursement for claims expenses from his professional liability insurer pursuant to a claims made policy. However, upon receiving the complaint against him, he engaged his own counsel and did not provide any notice to his insurer. Id. at 119. Not until almost two-and-a-half years after the complaint in the underlying action was served on him, and about three months after that case settled, did the insured finally notify his insurer of the claim. Id. at 120. On those facts, Judge Broderick held that the insurer was prejudiced by the insured's breach of the policy's notice provision, and therefore granted summary judgment in favor of the insurer. Id. at 121. Here, SCT timely notified Columbia Casualty of the potential claim, then promptly gave the insurer notice when Integral added it as a defendant. Clemente is plainly inapposite.

More notably, Pennsylvania jurisprudence does not support Columbia Casualty's position. The Commonwealth's courts have long held that "[a]n insurer's failure or refusal to defend a claim within the scope of an insurance policy constitutes a breach of contract for which it is subject to damages recoverable in an action of assumpsit." Vanderveen v. Erie Indem. Co., 208 A.2d 837, 838 (Pa. 1965). As a result, "[a]n 'insurance company's initial repudiation of the contract in denying

liability under the policy relieve[s] the insured of strict performance of those provisions intended for the protection of the insurer.'" Staples, Inc. v. Wausau Underwriters Ins. Co., 100 Fed. Appx. 84, 89 (3d Cir. 2004) (Sloviter, J.) (nonprecedential) (quoting Apalucci v. Agora Syndicate, Inc., 145 F.3d 630, 634 (3d Cir. 1998)). Accordingly, "[w]hen an insurer erroneously denies its duty to defend, fulfillment of the duty requires the insurer to pay for any defense costs already incurred." Kiewit Eastern Co., Inc. v. L & R Const. Co., Inc., 44 F.3d 1194, 1205 (3rd 1995); see also Kelmo Enterprises, Inc. v. Commercial Union Ins. Co., 426 A.2d 680, 683 n.4 (Pa. Super. Ct. 1981) (Pennsylvania law is "well settled that in an action in assumpsit for the breach of a covenant to defend recovery includes the costs of hiring counsel and other costs of defense").

Under its policy, Columbia Casualty had a right, not a duty, to defend the Integral action. Yet because it thrice rejected SCT's notices and refused to exercise its right to defend SCT in the Integral action, it breached the contract of insurance. Having done so, it abandoned the right to defend the Integral action and relieved SCT of the obligation to get the insurer's written consent for defense costs. To find otherwise and excuse Columbia Casualty from reimbursing the defense costs would reward its unwarranted denials. In sum, Columbia Casualty has an obligation to reimburse SCT for its defense costs.[12]

[12] SCT also contends that Columbia Casualty cannot rely (continued...)

C. Illinois Union

Because we have held that Columbia Casualty's policy covers SCT's claim, SCT's alternative counts against Illinois Union are moot, as SCT concedes. See Pl.'s Opp'n 21. Thus, we need not address Illinois Union's arguments at length, but we briefly note two reasons why that insurer's policy does not cover SCT's claim.

First, Exclusion L provides that Illinois Union's policy does not apply to any claim against SCT "based on or arising out of a **Wrongful Act**, fact or circumstance which before the effective date of the Policy was reported to [Illinois Union] or any other Insurer." Illinois Union Policy IV.L. The policy defines "wrongful act" as "any actual or alleged act, error, omission, misstatement, misleading statement, **Personal Injury**, neglect or breach of duty by [SCT] in the capacity of such or by any other person or entity for whom [SCT] is legally liable." Id. at II.Q. This definition, similar, but not identical to Columbia Casualty's, encompasses SCT's "alleged failure to

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[12](...continued)
on the policy's "contract" exclusion to deny coverage. Pl.'s Mem. 24-26. Under this exclusion, the policy does not apply to any claim "arising out of liability assumed by an **Insured** under any contract or agreement, unless such liability would have attached to the **Insured** even in the absence of such contract or agreement." Columbia Casualty Policy III.3.

Columbia Casualty does not invoke that exclusion now. It notes that if we find it received adequate notice, the terms of the policy limit its indemnity obligations, and it has reserved its rights under the policy. See Columbia Casualty's Mot., Ex. 27 Columbia Casualty Letter to SCT, Mar. 30, 2006 (stating a reservation of rights). As Columbia Casualty points out, those rights can only be assessed by considering facts developed in the Integral action. Those facts are not before us, so we cannot address the effect of the contract exclusion.

incorporate Australian and deregulation features into its product." Thus, SCT reported its alleged wrongful act -- as defined by Illinois Union's policy -- to Columbia Casualty prior to the effective date of Illinois Union's policy, so Illinois Union can invoke Exclusion L. Moreover, as evident from our discussion concerning Columbia Casualty, the Integral action is based on, or arises from, the same facts and circumstances that SCT reported to Columbia Casualty in 2001 -- namely, problems with the Integral CSS project.[13] In sum, Exclusion L precludes coverage.

Second, pursuant to Exclusion K, the policy does not apply to claims that are:

> based on or arising out of a **Wrongful Act** actually or allegedly committed prior to the beginning of the **Policy Period**, if, on or before the earlier of the effective date of this Policy or the effective date of any Policy issued by [Illinois Union] to which this Policy is a continuous renewal or replacement, [SCT] knew or reasonably could have foreseen that the **Wrongful Act** did or could lead to a **Claim**[.]

Illinois Union Policy IV.K.

SCT's two 2001 notices to Columbia Casualty -- sent before Illinois Union's policy came into effect -- leave no doubt

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[13] We note SCT's contention in a footnote that communications from Integral to SCT offered by Illinois Union are inadmissible hearsay. See Pl.'s Opp'n 20 n.6. Illinois Union contends that the communications, which SCT produced from its own files, are admissible because it offers them not for their truth, but to prove SCT's prior knowledge, notice, or information, and because they constitute business records or party admissions under Federal Rules of Evidence 803(6) and 801(d)(2), respectively. We agree with Illinois Union that the communications are admissible.

that SCT knew the nature of Integral's complaints and (correctly) foresaw that problems with Integral's CSS project could lead to a claim against it.[14] And even if SCT's 2001 letters had failed to satisfy Columbia Casualty's notice requirements, which is not the case, the foregoing statement would still be true. Thus, Exclusion K bars coverage for SCT's claim.

III. Conclusion

For the reasons stated herein, we hold that Columbia Casualty must defend and indemnify SCT in connection with the Integral action in Australia. We shall therefore grant SCT's motion for summary judgment against Columbia Casualty, and deny Columbia Casualty's motion against SCT. We shall also grant Illinois Union's motion for summary judgment against SCT because Illinois Union does not owe SCT coverage for the Integral litigation.

An Order and Judgment follow.

BY THE COURT:
/s/ Stewart Dalzell, J.

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[14] Richard Blumenthal, SCT's former General Counsel, colorfully and accurately described the situation when discussing SCT's notices to Columbia Casualty:

> And here we are saying again that the client has expressed dissatisfaction and that Integral has sued MITS. You don't have to be a rocket scientist to come to the conclusion that there is a possibility or even reasonable likelihood that you are going to get sued unless they can work it out.

Blumenthal Dep. 75:2-11, Jan. 5, 2007.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYSTEMS AND COMPUTER TECHNOLOGY CORPORATION	:	CIVIL ACTION
v.	:	
COLUMBIA CASUALTY COMPANY, et al.	:	NO. 06-1663

ORDER

AND NOW, this 25th day of April, 2007, upon consideration of Systems and Computer Technology Corporation's ("SCT") motion for summary judgment (docket entry # 49), Columbia Casualty Company's response thereto, Columbia Casualty Company's motion for summary judgment (docket entry # 50), SCT's response thereto, Illinois Union Insurance Company's motion for summary judgment (docket entry # 47), SCT's response thereto, and Illinois Union Insurance Company's motion for leave to file reply with the reply attached (docket entry # 67), and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. SCT's motion for summary judgment is GRANTED;

2. Columbia Casualty Company's motion for summary judgment is DENIED;

3. Illinois Union Insurance Company's motion for leave to file reply is GRANTED and the Clerk shall DOCKET the reply attached to that motion;

4. Illinois Union Insurance Company's motion for summary judgment is GRANTED; and

5. The Clerk shall CLOSE this case statistically.

BY THE COURT:

/s/ Stewart Dalzell, J.

IN THE UNITED STATES DISTRICT COURT
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v.	:	
COLUMBIA CASUALTY COMPANY, et al.	:	NO. 06-1663

JUDGMENT

AND NOW, this 25th day of April, 2007, for the reasons articulated in the accompanying Memorandum and Order, JUDGMENT IS ENTERED in favor of plaintiff Systems and Computer Technology Corporation and against defendant Columbia Casualty Company, and in favor of defendant Illinois Union Insurance Company and against plaintiff Systems and Computer Technology Corporation.

BY THE COURT:

/s/ Stewart Dalzell, J.